

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED NATIONAL INSURANCE  
COMPANY,  
  
Plaintiff,  
vs.  
  
LIMMIE YOUNG, III, et al.,  
  
Defendants.

Case No.: 2:16-cv-00121-GMN-PAL

## ORDER

Pending before the Court is the Motion to Dismiss, (ECF No. 18), filed by Defendants Audra Duvall and Michael Duvall (collectively “Defendants”). Plaintiff United National Insurance Company (“Plaintiff”) filed a Response, (ECF No. 20), and Defendants filed a Reply, (ECF No. 21). For the reasons set forth herein, Defendants’ Motion to Dismiss is **DENIED**.

## I. BACKGROUND

On January 22, 2016, Plaintiff filed the instant declaratory judgment action before this Court. Thereafter, Plaintiff improperly attempted service by delivering the copies of the summons and complaint to defense counsel’s office. (*See* Nielsen Decl. ¶¶ 3–4, Ex. 1 to Pl.’s Resp., ECF No. 20-1). Defendants’ counsel informed Plaintiff that service was improper but allegedly agreed to accept service at an unspecified later date. (*Id.*). Throughout the next several months, Plaintiff sent Defendants multiple letters in an attempt to reach a settlement agreement. (*Id.* ¶¶ 5–8). After efforts to reach an agreement failed, however, Plaintiff re-served Defendants on October 18, 2016. (Pl.’s Resp. 4:5–7, ECF No. 20; *see also* Summons, ECF Nos. 12, 13). On November 8, 2016, Defendants filed this Motion seeking to dismiss Plaintiff’s Complaint for untimely service pursuant to Federal Rule of Civil Procedure (“FRCP”) 4(m). (Mot. to Dismiss 1:18–24, ECF No. 18).

1       **II.     LEGAL STANDARD**

2           FRCP 12(b)(5) authorizes a defendant to move for dismissal due to insufficient service  
3           of process. Under FRCP 4(m), “[i]f a defendant is not served within ninety (90) days after the  
4           complaint is filed, the court—on motion or on its own after notice to the plaintiff—must  
5           dismiss the action without prejudice against that defendant or order that service be made within  
6           a specified time.” Fed. R. Civ. P. 4(m).

7            “[U]nless the procedural requirements of effective service of process have been satisfied,  
8           the court lacks personal jurisdiction to act with respect to that defendant at all.” *Cambridge*  
9           *Holdings Group v. Federal Ins. Co.*, 489 F.3d 1356, 1361 (D.C. Cir. 2007). Although Rule 4 is  
10          a flexible rule, “without substantial compliance with Rule 4 ‘neither actual notice nor simply  
11          naming the defendant in the complaint will provide personal jurisdiction.’” *Benny v. Pipes*, 799  
12          F.2d 489, 492 (9th Cir. 1986).

13          When a defendant challenges service, the Plaintiff bears the burden of establishing the  
14          validity of service under FRCP 4. *See Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004).  
15          In granting a Rule 12(b)(5) motion, the court may either dismiss the action without prejudice or  
16          retain the action and permit the plaintiff to cure the defects. *See Fed. R. Civ. P. 4(m)*;  
17          *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985).

18        **III.    DISCUSSION**

19          In the instant Motion, Defendants argue that the action against them should be dismissed  
20          because Plaintiff failed to complete proper service within ninety (90) days of filing the  
21          Complaint.<sup>1</sup> (Mot. to Dismiss 1:18–24). In support of this argument, Defendants assert that  
22          they were prejudiced by their belief that Plaintiff “no longer wished to proceed forward with

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<sup>1</sup> In their Reply, Defendants also argue that certain portions of Plaintiff’s opposition should be stricken for  
25          including settlement discussions. In reaching the instant ruling, the Court does not rely on these contested  
            portions. To the extent Defendants believe these discussions should not be part of the public record, Defendants  
            may bring a separate motion to strike.

1 the Declaratory Relief action given the time that had passed.” (*Id.* 3:17–20). Specifically,  
2 Defendants note that this action stems from “traumatic incidents” that Defendants have tried to  
3 forget. (*See* Defs.’ Reply 3:2–4, ECF No. 21). In response, Plaintiff contends that dismissal is  
4 improper because there exists good cause and justifiable excuse for the delay in service, and the  
5 dismissal would only result in a duplicative action against Defendants. (Pl.’s Resp. 7:11–16).

6 When a plaintiff has failed to properly serve defendants within the proscribed time  
7 period, the Court must decide whether to grant an extension for service or dismiss the action.  
8 *See In re Sheehan*, 253 F.3d 507, 513 (9th Cir. 2001) (stating that courts have broad discretion  
9 to extend time or dismiss under FRCP 4(m)). In making this determination, courts look to  
10 whether a plaintiff has provided “good cause” for the failure to effect service. *See* Fed. R. Civ.  
11 P. 4(m); *Fimbres v. United States*, 833 F.2d 138, 139 (9th Cir. 1987). At a minimum, “good  
12 cause” means excusable neglect. *Boudette v. Barnette*, 923 F.2d 754, 756 (9th Cir. 1991). A  
13 court may also look at whether “(a) the party that had to be served personally received actual  
14 notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a  
15 justifiable excuse for a failure to serve properly, and (d) the plaintiff would be severely  
16 prejudiced if his complaint were dismissed.” *Borzeka v. Heckler*, 739 F.2d 444 (9th Cir. 1984).

17 Here, the Court finds that Plaintiff has shown excusable neglect for its failure to  
18 complete proper service within the required period pursuant to FRCP 4(m). Notably, Plaintiff  
19 provided actual notice of the lawsuit through the attempted service on March 23, 2016, and  
20 continued to correspond with Defendants in a good faith attempt to reach a settlement. After  
21 discussions were unsuccessful, Plaintiff did ultimately properly serve Defendants on October  
22 18, 2016. While the Court is sympathetic to Defendants’ desire to move beyond litigation, the  
23 delay in service does not amount to legal prejudice to Defendants’ ability to defend against the  
24 action. Furthermore, as the statute of limitation for declaratory relief would not prevent  
25 Plaintiff from refiling a duplicate action, it would be an inefficient use of judicial resources to  
dismiss the Complaint without prejudice. *See Dredge Corp. v. Wells Cargo*, 80 Nev. 99, 102

1 (1964); *see also Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007) (“In making extension  
2 decisions under Rule 4(m) a district court may consider factors ‘like a statute of limitations bar,  
3 prejudice to the defendant, actual notice of a lawsuit, and eventual service.’”).

4 Based on the foregoing, and pursuant to FRCP 4(m), the Court will retroactively extend  
5 Plaintiff’s time to complete service to October 18, 2016—the date Plaintiff properly served  
6 Defendants. *See Mann v. American Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003) (the court  
7 may extend the deadline for service of process retroactively).

8 **IV. CONCLUSION**

9 **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss, (ECF No. 18), is  
10 **DENIED**.

12 **DATED** this 30 day of August, 2017.

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15 Gloria M. Navarro, Chief Judge  
16 United States District Judge  
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